United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6096

To be argued by
RICHARD P. CARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6096

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants,

—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA, AFL-CIO, et al.,

Intervenor-Appellants,

—and—

COMMUNITY SCHOOL BOARD, DISTRICT 26,

Intervenor-Appellant.

UNITED STATES OF AMERICA,

Petitioner-Appellee,

—against—

SOLOMON DERBYETSKY,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PETITIONER-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF FOR THE PETITIONER-APPELLEE

Statement of Issues

1. Whether the appeal of Howard L. Hurwitz from the civil contempt judgment and order should be dismissed for failure to file the requisite Notice of Appeal?

2. Whether the appeal of Howard L. Hurwitz from the civil contempt judgment and order should be dismissed as moot?

3. Whether Howard L. Hurwitz, as the employee, subordinate and agent of the defendant Board of Education for the City of New York, was required to obey the district court's injunction order?

4. Whether the Council of Supervisors and Administrators has standing to raise the Fifth Amendment rights of absent parties?

5. Whether the district court was correct in declining to decide the issue of whether any individual's Fifth Amendment privilege was violated?

6. Whether the Fifth Amendment privilege is inapplicable?

Preliminary Statement

A. The appeal from the civil contempt order

This should be an appeal from a final judgment and order of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered on June 23, 1976, against Howard L. Hurwitz,[1] holding him in civil contempt of an injunction order, previously issued on May 27, 1976. However, as is more fully explained below, no Notice of Appeal has ever been filed by or on behalf of Dr. Hurwitz.

The aforesaid injunction order required the distribution and completion of two federal information gathering instruments, the EEO-5 Form and the Special Compliance Report, for each school in the New York City

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[1] Appellant Howard L. Hurwitz is erroneously referred to as "Howard W. Horowitz" in the "Supplementary Brief For Intervenors-Appellants CSA and Defendant-Appellant Howard W. Horowitz", dated September 17, 1976 ("Supplementary Brief").

public school system. Dr. Hurwitz was cited for contempt by the Government because he had returned the EEO-5 Form and Special Compliance Report for Long Island City High School, of which he was principal, uncompleted and had refused to have the instruments completed. He was held in civil contempt after declaring to the district court that he would not comply with the injunction order.

Dr. Hurwitz in this appeal contends that the civil contempt judgment and order must be set aside because he was not a party or in privity with the parties to the proceedings which resulted in the issuance of the injunction order and hence was not bound by that order. Appellee takes the position that the matter is now moot because the civil contempt order has been dissolved, and, alternatively, that Dr. Hurwitz was properly required to obey the district court's injunction order and was accordingly properly held subject to the civil contempt authority of the district court to compel his compliance.

B. Appeal from order denying intervenors' application to vacate or modify the injunction order

Appellants Council of Supervisors and Administrators ("CSA") and Dr. Hurwitz also present this as an appeal from a final judgment and order of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered July 15, 1976, in favor of the United States of America, denying the application of the intervenors, CSA and the Community School Board for District 26 (the "local Board"), for an order vacating or modifying the injunction order of May 27, 1976. However, full argument on appeal from this order was heard by this Court on August 19, 1976. On September 23, 1976, this Court dismissed the two appeals of CSA and the one appeal of the local Board as moot.

Notwithstanding, it is now the contention of CSA and Dr. Hurwitz that the district court also erred in refusing to modify the injunction order to expressly provide that any principal, teacher or other school official, required to provide information, may have declined to do so by asserting his or her Fifth Amendment privilege against self-incrimination. It is the Government's position that the district court properly declined to modify the injunction order because appellants lack standing to raise the issue, because the issue of whether a principal, teacher or other school official could decline to provide information on the ground that his or her Fifth Amendment privilege against self-incrimination would be violated was not then justiciable, and, alternatively, because the Fifth Amendment privilege is not applicable in the present instance.

Statement of the Case

A. The proceedings underlying the injunction order of May 27, 1976

On May 10, 1976, the United States of America on behalf of one of its agencies, the Office for Civil Rights of the Department of Health, Education and Welfare ("OCR"), commenced an action to compel the lawful authorities of the New York City public school system to distribute, complete, and return two information gathering instruments: the EEO-5 Form [2] and the Special Compliance Report.[3] The action was necessitated by the re-

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[2] The EEO-5 Form (Joint Appendix at 69 "A 69") states on its face that it "is a joint requirement of the EEOC [Equal Employment Opportunity Commission] and the Office for Civil Rights and the National Center for Education Statistics of the Department of Health, Education and Welfare."

[3] The Special Compliance Report is an investigative instrument of OCR that was developed for the current OCR examination of the New York City school system. See Paragraph 2 of the Affidavit of Martin H. Gerry ("Gerry Aff.") at A13; the testimony of Carol Campbell at A82-97 and of Lucy Thompson at A135-36.

fusal and failure of the defendant Board of Education of the City of New York ("The Central Board") and Chancellor Irving Anker to timely distribute the instruments [4] and the Government's need to acquire the data for the current school years while it was still available.[5]

Completion of the EEO-5 Form and the Special Compliance Report was required by OCR pursuant to 45 C.F.R. §§ 80.6-80.7 in accordance with its duty to conduct periodic, in-depth, compliance examinations and to investigate complaints and data indicating possible violations of the statutory prohibitions barring discrimination.[6]

An in-depth compliance examination was initiated in July 1972 as the result of various complaints alleging unlawful discriminations on the grounds of race, color, national origin, sex and physical disabilities, and the Special Compliance Report constitutes the final city-wide investigative instrument of this four-year in-depth compliance examination.[7] The information to be provided

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[4] ¶¶4-9 Gerry Aff. at A14-19.

[5] Much of the information sought is not preserved in school records. (Testimony of Carol Campbell at A107-108.) Second, the data has to be correlated with all the other information obtained during the 1975-76 academic year and if this is not done, the entire year's acquisition of information would have to be recollected because of the need for consistency. (Testimony of Lucy Thomson at A135-36; A101-02.)

[6] ¶ 1, Gerry Aff. at A12-13; Special Master's Report, Finding No. 3 at A205. A description of the possible violations of law is contained in the Affidavit of Martin H. Gerry, sworn to March 3, 1976, originally submitted in a prior action and introduced into evidence during the hearing before the United States Magistrate as Government's Exhibit No. 14. (A179-180.)

[7] Special Master's Report, Finding No. 3 at A205; Testimony of Carol Campbell at A81-87 and that of Lucy Thomson at A133-136, 171-173, 176-177.

by this Report and by the EEO-5 Form was described in Paragraph 2 of the Gerry Affidavit (A13-14) as follows:

> "* * * The Special Compliance Reports seek to obtain the following data: the race, sex, handicap, and non-English language dominance of individual school populations, of students enrolled in particular programs, and of students who have been subject to certain actions within a school; the types of programs offered by the school; the non-English language capabilities of staff in the school and in certain programs; information on expenditures; information on programs or activities which are disproportionately single-sex or adjusted to maintain a specific male to female ratio; and other information about the school, e.g., how often its attendance boundaries have been changed in the last five years and the condition of its facilities. The EEO-5 forms seek to obtain information on the race and sex of staff, including full time and part-time staff and new hires."

A recipient of federal financial assistance is prohibited from discriminating against any person in any program or activity on the grounds of race, color or national origin under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, on the grounds of sex under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, and against the handicapped under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[8]

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[8] As a condition to receipt of such assistance, each recipient is required to execute an Assurance of Compliance whereby it agrees not to discriminate and to comply with all regulations. It was uncontested that the alleged Assurance of Compliance (¶ 13 Complaint at A9-10) was executed for the New York City public school system which is a recipient of federal financial assistance. (Special Master's Report, Finding No. 2 at A205.)

The district court determined that the Government was entitled to obtain the information in the EEO-5 Form and Special Compliance Report under these statutory provisions, that the data was relevant to OCR's investigation of possible violations of the statutory prohibitions, and that the defendants were expressly required by regulation, 45 C.F.R. §§ 80.6-80.7, and as a matter of contractual obligation under the Assurance of Compliance,[9] to complete and return both surveys. (Special Master's Report, Conclusions of Law, at A207-208.) Accordingly, a permanent injunction (A214-217) requiring the completion and return of both the EEO-5 Form and the Special Compliance Report was issued by the district court on May 27, 1976.

B. The scope and application of the permanent injunction

The district court's permanent injunction order, in accordance with Rule 65(d), Fed. R. Civ. P., and the Assurance of Compliance, required the defendants, "together with their successors in office and their agents, employees, subordinates, and all persons or entities in active concert or participation with them or subject to their supervision in this matter" to complete and answer fully the EEO-5 Form and the Special Compliance Report. The responsible education officials, on both the Central and local levels, determined what information would be acquired in advance and what information would be provided by supervisory and administrative

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[9] The Assurance of Compliance was executed on February 1, 1965, by the then President of the Central Board on behalf of the Central Board and all its successors, transferees, and assignees. (A9.)

personnel or by the faculty.[10] Accordingly, a copy of the injunction order was served by registered mail to the local boards and the district superintendents. Two copies were similarly sent to the principal of every school required to complete the two instruments, and one of these copies was required to be posted to enable the faculty and other school officials to read the order. On June 4, 1976, two copies of the injunction order were sent to Dr. Hurwitz, the Principal of Long Island City High School (A345), and were received on June 7, 1976. (A352.)[11]

C. CSA's intervention

On June 16, 1976, the district court entered an order permitting CSA to intervene in the action upon certain conditions, to wit that one or more of CSA's officers who were also principals individually be made party intervenors. (A236.) This condition was imposed to overcome the Government's objection that CSA lacked standing to raise the rights of others and their lack of authorization under § 12 of the General Associations Law to litigate this type of case. Accordingly, the district court directed CSA to cure the defects of its intervention by intervening "by their officers, so and so as officers and individually." (A236.) Notwithstanding the Government's repeated

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[10] See ¶ 6 and Exhibits 4 & 5 to the Gerry Aff. at A15-16; Transcript of Hearing before Special Master at A151.

[11] On June 10, 1976, the United States of America instituted contempt proceedings against CSA and its officers because CSA was publicly advising its members to disobey the district court's injunction order by returning the instruments uncompleted, *i.e.* without the requisite ethnic or racial dater. (See footnote 25, *infra*, at 21-22.) At the hearing on June 11, 1976, Dr. Hurwitz, one of the named officers of CSA, was personally served with a copy of the district court's injunction order at the direction of the district judge. (A344-455.)

efforts to have CSA properly comply with this direction,[12] CSA never properly intervened. CSA merely amended the caption to indicate it had intervened "by its officers." The Government had also objected to CSA's attempt to intervene in a representative capacity. (A236-37.) The district court accordingly limited the intervention to those individual principals who would personally appear in the action. (A237.) None did.

D. The contempt proceedings against Dr. Hurwitz

By order to show cause, dated June 15, 1976, the United States initiated contempt proceedings against 135 principals who had refused and failed to complete the EEO-5 Form and Special Compliance Report for their respective schools. Ultimately, all of these principals, except Dr. Hurwitz, agreed to complete the two instruments, and accordingly, on June 22, 1976, upon the Government's application, the contempt proceedings against them were dismissed.[13]

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[12] During the course of the proceedings held below and in this Court, both orally and in several memoranda of law, counsel for the Government stated that the district court conditioned the grant of CSA's motion for intervention on the personal appearance of one or more officers of CSA who were also principals. This defect thus could have been timely cured but never was.

[13] A number of principals objected to providing the ethnic or racial data because the Nazis had sought disclosure of the identities of Jews. Their expressed fear was that the Government could use the information to oppress or exterminate minority groups. Although the Government did not have an opportunity to respond to these objections, it should be noted that the data in question is sought on an aggregated basis and the identity of students and teachers is not requested, and the Government's purpose in collecting the data is, of course, to ascertain if the civil rights of these minority groups are being abridged. It should also be noted that comparable ethnic and racial information on students and staffs in the City's public schools, including L.I.C. High School, has in the past been provided Federal, state and local authorities.

Dr. Hurwitz, the principal of L.I. City High School, was one of the above principals that the United States had petitioned the district court to hold in contempt. The Government took this action against Dr. Hurwitz because he had returned the EEO-5 Form and the Special Compliance Report for his school uncompleted,[14] and had indicated to his lawful superiors his refusal to have these instruments completed for the school. The district court sought to have Dr. Hurwitz voluntarily comply with the terms of the May 27th injunction order and even expressed the willingness to hold under seal the completed instruments pending appellate review of the validity of the underlying injunction order. (A358-61.) Dr. Hurwitz, after consultation with his attorney, rejected the district court's proposal, indicating his unwillingness to abide by the decision of any court. (A360-61.) The district court accordingly held Dr. Hurwitz in civil contempt (A361), and ordered Dr. Hurwitz to surrender himself to the Community Treatment Center five evenings a week from 8:00 p.m. to 5:00 a.m. until he agreed to comply with the injunction order of the district court. (A365.) A temporary stay of execution of the civil contempt order was granted by the district court, and this Court on August 19, 1976, granted Dr. Hurwitz a further stay until argument of his appeal. However, upon the ap-

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[14] The Office of Educational Statistics ("OES") had distributed copies of the EEO-5 Form on or about May 7, 1976, and the Special Compliance Report on or about May 17, 1976. (A. 15; A-203.) The Form and Report for L.I.C. High School were received by OES uncompleted in toto on June 21, 1975, after classes for the school had terminated on June 17, 1976. (A-366.) It should also be noted that in the past, Dr. Hurwitz had one of the assistant principals complete the requisite forms and reports on the racial and ethnic composition of the student body and staff. In this case, Dr. Hurwitz, rather than assigning a subordinate to complete or oversee the completion of the Form and Report, apparently held the instruments for several weeks before returning them uncompleted to OES.

plication of the United States the civil contempt order was dissolved by the district court on September 21, 1976, because the instruments were completed to the extent then feasible by others.[15]

E. Proceedings before this Court

On June 25, 1976, Dr. Hurwitz filed an application for leave to pursue an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Government opposed Dr. Hurwitz's application in part because in the Government's view the civil contempt judgment against Dr. Hurwitz was appealable as a final judgment and order. On July 20, 1976, argument on this motion and others was heard by the Hon. Sterry R. Waterman, U.S.C.J., Thomas J. Meskill, U.S.C.J., and John R. Bartels, U.S.D.J. By order dated July 22, 1976, the above panel denied Dr. Hurwitz's application for leave to appeal.[16] No formal Notice of Appeal was ever filed by Dr. Hurwitz after leave to appeal under 28 U.S.C. § 1292(b) was denied and his appeal was never docketed.

On July 20, 1976, the above panel had ordered the consolidation of all CSA's appeals and the anticipated appeals of Dr. Hurwitz and the local Board, and upon appellants' application set an expedited briefing sched-

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[15] The EEO-5 Form and Special Compliance Report for L.I.C. High School were completed by one of the assistant principals and other school officials. Previously in June 1976, an unsuccessful attempt to have the instruments completed by Dr. Hurwitz's subordinates before they left for vacation was made.

[16] The Court may have denied Dr. Hurwitz's application for leave to file an interlocutory appeal because a second final judgment and order was entered on July 15, 1976, by the district court, denying intervenors'-appellants' application to set aside the district court's prior injunction order.

ule. Appellants' briefs were due on July 30, 1976, and argument was scheduled to be heard on August 19, 1976. By August 19, however, no brief was submitted on behalf of Dr. Hurwitz.[17] Accordingly, on August 19, 1976, the Government moved this Court to dismiss Dr. Hurwitz's appeal for failure to perfect his appeal and in the alternative to summarily affirm the contempt judgment and order in the event that CSA's brief was deemed submitted also on behalf of Dr. Hurwitz. At the argument, the Court questioned whether there was an appeal by Dr. Hurwitz. The attorney for Dr. Hurwitz stated that Dr. Hurwitz's appeal and CSA's were merged, and that CSA's briefs were submitted also on behalf of Dr. Hurwitz. The Court recommended that Dr. Hurwitz's appeal be separately pursued and perfected, and Dr. Hurwitz's attorney agreed to do so. The Court thereupon denied this part of the Government's motion, told Dr. Hurwitz's attorney to perfect the appeal and granted Dr. Hurwitz until September 17, 1976, to submit a brief.

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[17] When counsel for the United States inquired about the absence of a brief on behalf of Dr. Hurwitz, counsel for Dr. Hurwitz advised that no final decision was made as to whether Dr. Hurwitz's appeal from the civil contempt order would be pursued.

ARGUMENT

POINT I

The failure to file a notice of appeal from the civil contempt order should be deemed to bar appellate review in this case.

Ordinarily, as a jurisdictional prerequisite, a timely Notice of Appeal must be filed. *Guido* v. *Ball*, 367 F.2d 882, 882-883 (2d Cir. 1966); *United States* v. *Bloom*, 164 F.2d 556, 557 (2d Cir. 1947), *cert. denied*, 333 U.S. 85 (1948). Where due to a good faith error or excusable neglect a Notice of Appeal was not timely filed, the courts of appeals will either grant an extension of time to file the Notice or liberally construe the rule to find some other filing to be in satisfaction of the requisite Notice. See, *e.g.*, *Cobb* v. *Lewis*, 488 F.2d 41, 44-46 (5th Cir. 1974).

In this present case, the Court should not find that the application for leave to appeal pursuant to 28 U.S.C. § 1292(b) by Dr. Hurwitz was in satisfaction of the requirement for the filing of a Notice of Appeal for several reasons. First, counsel for the Government had consistently taken the position that the application for an interlocutory appeal was improper and that a Notice of Appeal should have been filed. (Statement of the Case, *supra*, at 11.) Second, counsel for Dr. Hurwitz are experienced and skilled litigators and although expedited review had been requested by them and obtained, a conscious decision was made not to separately pursue the appeal from the civil contempt order. Thus Dr. Hurwitz's brief, which was originally due on July 30, 1976, was neither served nor filed and counsel for Dr. Hurwitz subsequently represented to this Court that Dr. Hurwitz's appeal would be limited to the issues raised in CSA's

brief. However, when the panel of August 19, 1976, advised Dr. Hurwitz's attorney that it would be serious error not to separately pursue Dr. Hurwitz's appeal from the civil contempt order, counsel for Dr. Hurwitz agreed to follow the panel's recommendation. Although the August 19th panel had also questioned the existence of the Hurwitz appeal, no Notice of Appeal was subsequently filed. Consequently the Hurwitz appeal was never separately docketed. Finally, it is apparently still the position of Dr. Hurwitz's attorneys that Dr. Hurwitz's appeal is not separate from CSA's for when Dr. Hurwitz's brief was served on September 17, 1976, the principal matter addressed was not Dr. Hurwitz's appeal from the civil contempt order, but CSA's appeal from the district court's order denying CSA's application to have the injunction order vacated or modified.

Under such circumstances, this Court should hold that the appeal of Dr. Hurwitz is barred by his failure to file a Notice of Appeal.

POINT II

The appeal from the civil contempt order should be dismissed as moot.

It is axiomatic that appeals are from orders and that "no appeal is necessary from an order which has been vacated." *Theodoropoulos* v. *Thompson-Starrett Co.*, 418 F.2d 350, 353 (2d Cir. 1969). Since the civil contempt order against Dr. Hurwitz has been vacated, and the Government is no longer seeking to compel Dr. Hurwitz to complete or have completed the EEO-5 Form or the Special Compliance Report for the 1975-1976 academic year, the controversy has ceased and the appeal has become moot and should be dismissed.

POINT III

Dr. Hurwitz, as the employee, subordinate and agent of the defendants, was subject to the injunction order and accordingly was properly held in civil contempt.

The sole ground raised by Dr. Hurwitz for challenging the validity of the civil contempt judgment is that he was neither a named party defendant to the original proceedings or in privity with the defendants. Such a contention, however, is specious, for as principal of a New York City high school, he is an employee of the Central Board, subject to the defendants' direct and immediate control and supervision, and with respect to L.I.C. High School, he is the primary agent or instrumentality by and through whom defendants were to effect compliance.[18] Dr. Hurwitz,

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[18] With respect to all principals and other school officials, even those under the immediate authority of the local Boards, the district court held as follows (A380):

> "* * * Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction or restraining order is binding on
>
> 'Parties to the action, their officers, agents, servants, employees, and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise'
>
> Inasmuch as principal's [sic] and supervisor's [sic] salaries are the responsibility of the Central Board in its capacity of 'Public Employer' under the Education Law of New York State and in view of the fact that the Central Board by that law, formally appoints all supervisors, teachers; is responsible for paying the salary of all salaried employees and is empowered to require local Community Boards to render such reports as necessary. [sic] Education Law of New York State Art. 52 Section 2573 1(b), Art 52-A Section 2590-g Subdivisions 5, 6 and 7. [sic] The Local Boards, principals, teachers and other employees are subject to the authority of the Central Board and thereby bound by the Court's injunction order as contemplated in Rule 65(d) of the Federal Rules of Civil Procedure."

as the agent, employee and subordinate of the defendants, was thus bound to comply with the injunction order. See, *e.g.*, *Chase Nat'l Bank* v. *Norwalk*, 291 U.S. 431, 436-37 (1934); *Backo* v. *Local 281, United Bros. of Carpenters & Joiners*, 308 F. Supp. 172, 177 (S.D.N.Y. 1969), *aff'd*, 438 F.2d 176 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). As principal his position is clearly comparable to that of an officer of a corporation or manager of a business and the injunction was thus binding on him. See, *Wilson* v. *United States*, 221 U.S. 361, 376 (1911).

Here, Dr. Hurwitz had actual notice of the injunction order, having received by registered mail copies of the order approximately two weeks before he returned the instruments uncompleted, having been personally served with a copy of the order in the presence of the district court approximately one week before he returned the instruments uncompleted, and having again been presented with a copy of the order by the district court during the civil contempt trial on June 23, 1976. He was thus clearly obligated to obey the order: "* * * It is axiomatic that a court order must be obeyed, even assuming its invalidity, until it is properly set aside." *Leighton* v. *Paramount Picture Corp.*, 340 F.2d 859, 861 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965). *Maness* v. *Meyers*, 419 U.S. 449, 458-59 (1975); *Walker* v. *City of Birmingham*, 388 U.S. 307, 312-15 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-94 (1947).

What Dr. Hurwitz contends is that the United States, in order to have made the injunction effective, should have named as defendants in the original proceedings every principal, supervisor and administrator, every teacher, and any other person who conceivably could have been required by defendants to participate in some way in providing information for completion of the Form and Re-

port, regardless of the fact that the United States had no cause of action against such persons at the time. Such a requirement has been rejected by the courts and would indeed render enforcement of the civil rights laws virtually ineffectual. See, *e.g.*, *United States* v. *Hall*, 472 F.2d 261, 264-66 (5th Cir. 1972) (upheld contempt conviction of non-party for violation of desegregation order). See generally, *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91, 102-105 (8th Cir. 1956).

Here, Dr. Hurwitz was charged by his lawful superiors with the responsibility of completing or having completed the two instruments. He did not do so, but rather held the instruments for several weeks and returned them uncompleted only after all classes for the year had ended, in an apparent attempt to impair or defeat the Government's investigation.[19] Immediate compliance with the order was also required since the data had to be for the then current school year and much of the information sought was not preserved in records.[20] The district court generously offered a proposal that would have fully protected Dr. Hurwitz's lawful rights, but he refused to comply even under such conditions.

Under all of these circumstances, Dr. Hurwitz was correctly found subject to the injunction order and properly held in civil contempt.

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[19] Indeed, the fact that the students were no longer attending classes was raised by Dr. Hurwitz as the reason why the injunction order could not been enforced by civil contempt. (A366-67.)

[20] With respect to L.I.C. High School, subsequently this fall most but not all of the data was provided. Also to the extent the accuracy of some of the data is dependent upon the accuracy of the memories of the staff, the reliability of this data may have suffered as memories faded.

Point IV

The Court should affirm the district court's order of July 15, 1976, because CSA lacks standing to contest the district court's refusal to modify the prior issued injunction order so as to provide that individuals required to provide data be allowed to raise their Fifth Amendment privilege against self-incrimination.

It should first be noted that the United States has moved to strike those portions of the Supplementary Brief respecting the issues raised in the appeal from the district court's order of July 15, 1976, denying the intervenors' (CSA and the local Board) application for vacation or modification of the May 27, 1976, injunction order because on August 19, 1976, leave was granted only to Dr. Hurwitz to pursue his appeal from the civil contempt order of June 23, 1976. Leave was not granted to CSA to reargue its appeal from the July 15th order. Nor may Dr. Hurwitz pursue CSA's appeal now. Although Dr. Hurwitz, as the principal of L.I.C. High School, was named as a respondent in a contempt proceeding, he did not personally appear as an intervenor in the proceedings below initiated by CSA's intervention.[21] Thus, to the extent that appellate review of the validity

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[21] During the appeal argument heard on August 19, 1976, counsel for CSA contended that when CSA intervened "by its officers" this constituted a personal appearance by all of its officers, one of whom is Dr. Hurwitz. This Court, in dismissing CSA's appeal as moot, implicitly held that Dr. Hurwitz and the other officers did not thereby personally appear as intervenors since the Court indicated that the only controversy not then moot was that respecting Dr. Hurwitz's refusal to provide the data for L.I.C. High School.

of the district court's July 15, 1976, order is now sought, review should be denied because the matter was heard on CSA's appeal on August 19, 1976, that appeal was dismissed by this Court on September 23, 1976, and no application for reconsideration has been sought or granted.[22]

Alternatively, the Court should affirm the district court's order of July 15, 1976, on the grounds that CSA lacks standing to raise the rights of absent third parties. In failing to comply with the direction of the district court that individual principals be joined as party intervenor's (A236), CSA failed to cure the very defects which prevent it from having standing to intervene. These defects are twofold. First, as an unincorporated association it is authorized by § 12 of the General Association Law of the State of New York (McKinney's 1942) to maintain an action only "by the president or treasurer * * * to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action * * * by reason of their interest jointly or in common. * * *" Since an interest, jointly or in common, respecting the obligation to provide the data required by the injunction order, does not exist in all of CSA's members, as members of CSA *per se*, CSA is not authorized by state law to maintain this action.

Nor may reliance be placed upon the provisions of Rule 17(b), Fed. R. Civ. P., which allows an unincor-

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[22] Nor is the issue relevant to review of the June 23, 1976, civil contempt order respecting Dr. Hurwitz. During the civil contempt proceedings Dr. Hurwitz did not raise the issue that to compel the completion of the instruments would constitute a violation of his Fifth Amendment privilege against self-incrimination. Dr. Hurwitz, represented by counsel, defended on other grounds.

porated association to sue in its own name only if state law does not give it capacity to sue. Then the rule allows an association to sue only for "the purpose of enforcing for or against it a substantive right under the Constitution or law of the United States." Neither of these prerequisites is satisfied here. First, as stated above state law grants unincorporated associations capacity to sue. Second, CSA is not attempting to enforce or protect *its* rights under the Constitution or federal laws since CSA is not required to provide any of the required data.[23]

CSA, in effect, attempted to raise the private, personal rights of individuals who were not parties to the proceedings.[24] This constitutes the second defect preventing its having standing, for generally a person may assert only his own legal rights and interests and not those of another. *E.g.*, *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943). See, *United States* v. *Raines*, 362 U.S. 17, 22-23 (1960); *Warth* v. *Seldin*, 422 U.S. 490, 499-501, 508-10 (1975). This general principal derives from the constitutional limitation on the power of the judiciary in

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[23] Nor may reliance for establishing its standing be placed upon those cases in which a labor union was allowed to represent the interests of its members in connection with a dispute with an employer, since the district court denied CSA leave to intervene to represent its members generally (A236-3), and since this is not a labor dispute with an employer. *Cf.*, *e.g.*, Council No. 34 Am. Fed'n of State, County and Municipal Employees, AFL-CIO v. Ogilvie, 465 F.2d 221, 225-26 (7th Cir. 1972).

[24] Upon the Government's objection, the district court limited CSA's intervention to representation of the interests of the individual principals and officers of CSA who would personally appear in the action. (A236-37.) No individual officer or principal, including Dr. Hurwitz, personally appeared as an intervening party.

Article III and as a rule of judicial restraint. The reasons for this restriction are clear. Where a person asserts the rights of another there may not necessarily be a genuine case or controversy. The party whose rights are being asserted may not want or be interested in pursuing his or her rights. Thus any decision rendered by a court would be advisory. Also, the party asserting another person's rights may not necessarily be acting consistent with the others' interests and indeed there may very well be a conflict of interest between the two. Thus there is a danger of inadequate representation and even collusion or fraud. For these and other reasons the Supreme Court has recognized only a few exceptions to the general rule, none of which are applicable to the present case. See generally, Sedler, *Standing To Assert Constitutional Jus Tertii In the Supreme Court*, 71 Yale L.J. 599 (1962), cited with approval in *Warth* v. *Seldin*, *supra*, 422 U.S. at 510, n. 20.

For these same reasons, the rule should be applied here. First, CSA may be taking a position that is adverse or contrary to the interests of many or some of its members, *e.g.*, those who are members of a minority group. Second, ample opportunity existed for any member required to provide data to represent his or her own interest,[25] and, third, he or she could do so without any

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[25] Indeed CSA stated in its "Hot Line" message of June 9, 1976, that it would provide the necessary legal assistance for any member who chose to defy or challenge the injunction order:

> "* * * CSA maintains its policy not to answer questions concerning ethnic and racial data. CSA advises that full legal protection will be provided for any supervisor acting in accordance with the CSA position which is based on the individual supervisor's conscience and constitutional rights. CSA advises its members to submit incomplete forms to the District Chairman as directed. These forms

[Footnote continued on following page]

impairment to protected constitutional rights resulting from the member's representation of himself or herself. Under these circumstances there is no reason to make an exception to allow CSA to litigate the rights of others.

For these reasons CSA's appeal from the final order of the district court should be dismissed for failure to intervene in the manner required by the lower court and because it lacks standing to raise the rights of absent parties.

POINT V

The Court should affirm the district court's July 15, 1976, order because the issue of whether the district court should have modified the injunction order to provide for the raising of the Fifth Amendment privilege against self-incrimination was not justiciable at the time.

Even assuming that CSA has standing to raise the Fifth Amendment rights of individuals not parties to the proceeding, the district court properly declined to modify the injunction order to allow individuals to assert the privilege against self-incrimination because the issue was not raised by either CSA or the intervening local Board [26] and because no individual appeared in the proceedings to assert this right. The issue was raised *sua*

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will be incomplete since we will not answer questions re ethnic data. The District Chairman will then submit these incomplete forms with a covering letter from CSA to the appropriate superintendent. * * *" ¶ 9 of the Verified Complaint in *United States of America* v. *Council of Supervisors and Administrators*, contained in record on appeal.

[26] The local Board raised the issue only with respect to itself.

sponte by the Magistrate. Upon the Government's exception, the district court declined to adopt the portions of the Magistrate's Report and recommendations pertaining to the assertion of the Fifth Amendment privilege against self-incrimination in the absence of the assertion of the privilege by a particular person. The Government contends that the District Judge properly declined to modify the injunction order.

The Supreme Court in *Stearns* v. *Woods*, 236 U.S. 75, 78 (1915), noted that "[T]he province of courts is to decide real controversies, not to discuss abstract propositions." This principle has been deemed to require courts to limit themselves to the adjudication of the contested issues raised by the parties in a concrete factual context. See, *e.g.*, *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 242 (1937). In *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 585 (1972), the Supreme Court upheld the decision of the lower court which had declined to rule on the merits of a claim respecting the constitutionality of an Ohio election statute requiring a loyalty oath which had not been effectively raised or litigated below. The Court stated its reasons as follows:

> "* * * [E]ven when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form. . .' Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the court's jurisdiction even though that jurisdiction is technically present. . .
>
> "We find that the present posture of this case raises just such an obstacle. All issues raised below have become moot except for one that received scant attention in appellant's complaint and was treated not at all in the affidavits filed

> in support of the cross motions for summary judgment. Nothing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative." *Socialist Labor Party* v. *Gilligan*, *supra*, 406 U.S. at 588-89 (1972), quoting in part, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 574, 584 (1947).

The problems of speculativeness, abstractness, and prematurity clearly exist here. Since the persons whose constitutional rights are claimed to be violated never appeared to assert their rights, the facts necessary to determine whether the privilege would be applicable were never presented or developed. As this Court stated in *Terkildsen* v. *Waters*, 481 F.2d 201, 204-5 (2d Cir. 1973):

> "* * * Adherence to the rule [of practice which forecloses appellate consideration of issues not raised below] is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court. * * *"

See also, *Schwartz* v. *S. S. Nassau*, 345 F.2d 465, 466 (2d Cir.), *cert. denied*, 382 U.S. 919 (1965).

For the above reasons the Court should affirm the district court's refusal to modify the injunction order in the absence of any person appearing in the action and asserting his or her Fifth Amendment right against self-incrimination in defense to being compelled to provide the required data.

POINT VI

Alternatively, The Fifth Amendment privilege is not applicable because the requisite degree of probability of prosecution does not exist, the data sought is not incriminatory in nature, and is otherwise required to be produced.

The criteria for determining when a person otherwise required to disclose information may, nevertheless, assert the constitutional privilege against self-incrimination were set forth in *California* v. *Byers*, 402 U.S. 424 (1970). Upon its analysis of prior precedent, the Supreme Court there held that this personal privilege was not applicable unless there was a " 'substantial' " possibility of criminal prosecution (402 U.S. at 428-30) and that, even if this likelihood of prosecution existed, the privilege did not protect from compulsory disclosure essentially neutral facts required for legitimate Government purposes. 402 U.S. at 432-34.

The meaning of a substantial possibility of criminal prosecution was explained by the Court in *Byers* to constitute "* * * disclosures * * * extracted from a 'highly selective group inherently suspect of criminal activities' * * * in 'an area permeated with criminal statutes'—not in 'an essentially noncriminal and regulatory area of inquiry.' " 402 U.S. at 430.

Here information is not being extracted "from a 'highly selective group inherently suspect of criminal activities.' " Principals, teachers and other school officials are not inherently criminally suspect categories of people. See, *Heligman* v. *United States*, 407 F.2d 448, 451 (8th Cir. 1969), *cert. denied*, 395 U.S. 977 (1969) (holding that corporate officers are not an inherently criminally suspect group).

Secondly, the investigation here is "in 'an essentially noncriminal and regulatory area of inquiry.'" The inquiry concerns whether a recipient of federal financial assistance has violated the terms and conditions to its receipt of such assistance. In *Albertson* v. *SACB*, 382 U.S. 70 (1965), *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Gosso* v. *United States*, 390 U.S. 62 (1968), and *Hayes* v. *United States*, 390 U.S. 85 (1968), the privilege was asserted to bar compulsion to disclose information to federal authorities respecting crucial elements of federal crimes. In each case the information being compelled constituted itself a virtual admission of illegal activities and subjected the discloser of the information to almost certain and imminent prosecution. This is clearly not the case here.

In the circumstances of the present case, the requisite degree of immediacy and probability of criminal prosecution is plainly not present. Cf. *Zicarelli* v. *New Jersey St. Com'n of Investigation*, 406 U.S. 472, 478-479 (1972). If anything it is remote, and the remoteness of the likelihood of prosecution is further increased by the fact that the identity of the person providing the information is not disclosed except in the instance of the person who executes a certification. But even in this case, the certification may be executed by someone who was not a party to any allegedly discriminatory acts or activities or who is not providing any data.

Thus, the Government contends that there does not exist a sufficient threat of criminal prosecution that would warrant an individual who is required to observe and report his observations from refusing to do so under the privilege against self-incrimination.

However, even assuming that there were a substantial possibility of criminal prosecution, the privilege

against self-incrimination does not relieve a person of the obligation to disclose essentially neutral, non-incriminatory facts. The Court in *Byers* noted that irrespective of collateral consequences, "[d]isclosure of name and address is an essentially neutral act," 402 U.S. at 432, and further that "[a] name linked with a motor vehicle is no more incriminating than the tax return, linked with the disclosure of income * * *. It identifies but does not itself implicate anyone in criminal conduct." (Citation omitted) 402 U.S. at 433-34. Under this principle it has been held also that disclosure of the physical characteristics of a person, such as height and weight, may be compelled, *United States* v. *Leyba*, 504 F.2d 441, 443 (10th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975), and that a person may be required to disclose the identity of others, including their names and social security numbers. *United States* v. *Turner*, 480 F.2d 272, 277-78 (7th Cir. 1973). Similarly, no Fifth Amendment privilege operates to relieve a person of his obligation to disclose information required by various regulatory statutes, such as the securities laws, drug laws, alcohol and firearm laws. See, *e.g.*, *United States* v. *Resnick*, 488 F.2d 1165, 1168 (5th Cir.), *cert. denied*, 416 U.S. 991 (1974).

The information sought here by the Government is similarly of a neutral, non-incriminating nature, required by law to be disclosed in connection with the Government's right to assure that the deprivation of the civil rights of any person by a recipient of federal financial assistance is not occuring. Only aggregate data concerning primarily race, ethnicity, sex, language abilities, or physical disabilities is being required to be disclosed. The identity of individuals is not being sought. The disclosure of the data required is similar to that provided in the past to federal, state and local authorities. Clearly this type of information is as neutral in nature as a person's name, address, height, weight, or social security number, and

certainly less "incriminating" than the disclosure of an identified person's income and the various regulated transactions and activities engaged in by the person identified. It is also significant that the intervenors have not raised any legal objection to disclosing aggregate data concerning the sex [27] of either students or staff. Clearly aggregate ethnic and racial data on students and staff is no more incriminatory in nature than data on the number of males and females in a particular class, school or district. If disclosure of the latter type of information can be compelled notwithstanding an assertion of the Fifth Amendment privilege, so too should the former data be found neutral and required to be disclosed.

Finally, the data that the Government seeks is required to be disclosed by the legal entity known as the New York City School District. This entity can only act through its human instruments, who have been duly directed by their superiors to obtain the data. These human instruments, be they principals or teachers or other school officials, are required to look up records and files, and in some instances to ascertain someone's ethnicity or race or sex or language disability by observation or from the general knowledge that they had obtained as employees of the school system. After the information is gathered, someone must aggregate it and fill out the requisite Form or Report. Neither the nature of the data or of the compilations requires that it be acquired or aggregated by any particular school official.

The Fifth Amendment privilege of these individuals is simply not violated by requiring them to observe and

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[27] Since the names of people are neutral facts and since a person's sex can generally be determined from his or her first name, then it can not be concluded that the Fifth Amendment privilege ordinarily protects from compulsory disclosure the fact that a person is male or female.

report in their official capacities since the privilege is limited to natural persons and thus cannot be raised by the recipient as grounds for refusing to submit reports and other filings required by law. For example, in *Heligman* v. *United States*, *supra*, the president of a corporation refused to fill out and file the corporation's income tax form on the grounds that to compel him to fill out the form would require him to disclose information which might incriminate him with respect to pending and potential criminal charges. The Court of Appeals rejected this contention and held as follows (407 F.2d at 451-52):

> "The defendant, as a corporation president, has a statutory obligation either file or cause to be filed a proper corporate tax return. The affirmative requirements of § 7203 are directed to all taxpayers, corporate and individual, who are subject to filing a return under the tax laws. It is neutral in its application and is not directed against a group 'inherently suspect of criminal activities.' Corporation presidents and the other corporate officers mentioned in § 6062 are not an inherently suspect group.
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> * * * * *
>
> "Furthermore, the defendant was not privileged to refuse the production of corporate records nor could he withhold any incriminatory corporate records. These are not personal records and the government has a right to view corporate records for legitimate investigative purposes. *Wilson* v. *United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L. Ed. 771 (1911), long ago held that the president of a corporation could not refuse to produce corporate records on the ground that they would incriminate him, stating at 384, 31 S.Ct. at 546.
>
> 'If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he

were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures.'

Later the Supreme Court of the United States in *United States* v. *White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), held an officer of a labor union could not refuse to produce union records under a Fifth Amendment claim against self-incrimination, the Court reasoning at 699, 64 S.Ct. at 1251. 'But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.'

"There is another aspect of defendant's claim which should be mentioned. While we are of the opinion that the Fifth Amendment claim against self-incrimination is not available to the defendant under the facts of this case, it is difficult for us to perceive how the defendant can seriously advance his claim when he could easily have had some other corporate officer sign the return and file it so that actually he was not confronted by any substantial and real hazard of compelled incrimination. * * *"

The information sought is not "personal", within the meaning of the Constitutional privilege, with respect to individuals being required to provide the information in their official capacity for and on behalf of the school system as the statement from *United States* v. *White*, quoted above, makes clear. Here, the demand for

the data is made on the artificial entity, the individual is not being personally examined, the individual is not the subject of a criminal inquiry, and the data is being provided anomously. See *Bellis* v. *United States*, 417 U.S. 85, 90-92 (1974); *Curcio* v. *United States*, 354 U.S. 121, 124-125 (1957); *United States* v. *White*, *supra*, 322 U.S. at 695-96, 704. The person providing the information for the school system thus cannot relieve the school system of its obligation to provide the data by raising personal rights which are unavailable to the school system.

Additionally, even if the information required to be disclosed could be obtained solely from an individual's "personal" knowledge, and not from existing records, the person can be compelled to disclose the information notwithstanding the privilege, otherwise enforcement of the laws would become impossible and a sham. Compliance with tax laws could be easily avoided by failing to maintain records. Cf. *Stoltzfus* v. *United States*, 264 F. Supp. 824, 828 (E.D. Pa. 1967), *aff'd*, 398 F.2d 1002 (3d Cir. 1968), *cert. denied*, 393 U.S. 1020 (1969). Similarly, required disclosure of regulated transactions, cf. *United States* v. *Various Gambling Devices*, 368 F. Supp. 661, 664-68 (N.D. Miss.), *aff'd*, 478 F.2d 1194 (5th Cir. 1973), or the identity of business associates, cf. *United States* v. *Turner*, *supra*, 480 F.2d at 276-78, could be easily avoided by the contention that the information is obtainable only from the memory of the person asserting the privilege. Here, to require individuals in their capacity as the instruments, agents and employees of the New York City public school system, in their role as public officials, to gather information by observation and then record it is no more constitutionally privileged than requiring that same person to look up information in records and files and then record

it.[28] As Mr. Justice Holmes stated in *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927), with respect to a person claiming that the privilege rendered him immune from having to fill out as well as file an income tax return, "[The defendant] could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." Finally, where as here there may be other persons who may provide data without fear of self-incrimination, the information must be provided as the Supreme Court noted in *United States* v. *Kordel*, 397 U.S. 5, 8 (1970):

> "To be sure, service of the interrogatories obliged the corporation to 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.' The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. 'It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have.' Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agent." (Footnotes deleted.)

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[28] As the Government's Memorandum before the Magistrate indicated, there is also a substantial question concerning whether school officials waived any right not to disclose this information when they accepted and continued in the employ of the school system notwithstanding the fact that the law required the disclosure of such data. Indeed similar data has been provided in the past to federal, state and local authorities. (Compare N.Y.S. BEDS, EEO-5 Forms and OCR's 102 Forms for prior years.) In addition as direct or indirect beneficiaries of federal financial assistance, they should be deemed to have agreed to provide the requisite information.

The Court should thus hold that the Fifth Amendment privilege is not applicable here because the requisite degree of probability of criminal prosecution does not exist, the information sought is neutral and not incriminatory, and is otherwise required to be produced as a matter of course as a condition to receipt of federal financial assistance.

CONCLUSION

For the reasons stated herein, the Court should dismiss the appeal, or, in the alternative, affirm both of the district court's orders, the civil contempt order of June 23, 1976, and the order of July 15, 1976, denying intervenors' application for vacation or modification of the injunction order of May 27, 1976.

Dated: Brooklyn, New York
October 1, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 5th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE PETITIONER-APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

W. Bernard Richland, Esq.
Corp. Counsel of the City
of New York
Municipal Building
New York, N.Y. 10007

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Frankle & Greenwald, Esqs.
80 Eighth Avenue
New York, N.Y. 10011

Evelyn Cohen

Sworn to before me this
5th day of Oct. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 41-4618704
Term Expires March 30, 1977